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No. 907

# In the Supreme Court of the United States

OCTOBER TERM, 1936

JESSE C. DUKE, APPELLANT

*v.*

THE UNITED STATES OF AMERICA

*ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

So far as appears from the certificate, no opinion was rendered either by the District Court or by the Circuit Court of Appeals.

### JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on April 20, 1937. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

The questions certified are the following:

1. May a misdemeanor for which no infamous punishment is prescribed be prosecuted by information where the punishment therefor may exceed $500 fine or six months' imprisonment without hard labor, or both?

2. May an offense under Section 137 of the Criminal Code be prosecuted by information?

## STATUTE INVOLVED

### CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, so far as pertinent provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *.

The pertinent statutory provisions appear in the Statement at pages 2, 3, *infra*.

## STATEMENT

The following statement of facts is contained in the certificate:

> This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides—
>
> "Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writ-

ing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both."

The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months imprisonment or fine of $1,000, or both, may be prosecuted by information, in view of Sec. 335 of the Criminal Code. 18 U. S. C. A. 541, which, as amended by the Act of Dec. 16, 1930, 46 Stat. 1029, provides—

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: Provided, that all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Notwithstanding the decision in *Thorm* v. *United States* (C. C. A. 3d), 59 Fed. (2d) 419, cert. denied 287 U. S. 524, this Court is divided and in doubt as to whether a misdemeanor may be prosecuted by informa-

tion where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court.

## SUMMARY OF ARGUMENT

Section 335 of the Criminal Code prior to its amendment in 1930 classified offenses as felonies and misdemeanors, and under this statute it was uniformly held that misdemeanors punishable by fine or by imprisonment not exceeding one year without hard labor, or both, were not infamous crimes within the meaning of the Fifth Amendment, and might be prosecuted by information. *Falconi* v. *United States,* 280 Fed. 766 (C. C. A. 6th), and cases cited; *Hunter* v. *United States,* 272 Fed. 235, 238 (C. C. A. 4th); *Christian* v. *United States,* 8 F. (2d) 732, 733 (C. C. A. 5th).

On December 16, 1930, Congress amended Section 335 of the Criminal Code by adding to the original provisions the following proviso:

> *Provided,* That all offenses, the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500,

> or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint.

The position of the appellant is that this amendment constituted a limitation upon the power to prosecute for misdemeanors by information. This precise question was ruled against the appellant in *Thorm* v. *United States,* 59 F. (2d) 419 (C. C. A. 3d), in which this Court denied certiorari, 287 U. S. 624. As that decision pointed out, the only legal effect of the amendment was to divide misdemeanors into two classes, one of which was to be designated as "petty offenses", and there is nothing in the amendment which either expressly or by reasonable implication can be considered as requiring the prosecution by indictment of any misdemeanor which it had been uniformly recognized theretofore might be prosecuted by information. The purpose of the amendment is clearly disclosed by its genesis. A study of the legislation pending when this amendment was introduced shows that it was then proposed to give United States Commissioners authority to try petty offenses, particularly in view of the congestion in the Federal courts which had resulted from prosecutions arising under the National Prohibition Act. Had that bill become law, the amendment would have been effective to permit the prosecution of petty offenses before such magistrates upon complaint or information. As it is, the present legal effect of the amendment is to define petty offenses and to permit their

prosecution, not only by information, but also by complaint without leave of court. Only by a forced and unnatural construction can there be read into this amendment a provision that misdemeanors theretofore triable on information must thereafter be prosecuted by indictment.

## ARGUMENT

### THE AMENDMENT IN 1930 OF SECTION 335 OF THE CRIMINAL CODE DID NOT ABROGATE THE WELL-ESTABLISHED RULE THAT MISDEMEANORS PUNISHABLE BY FINE, OR IMPRISONMENT FOR NOT MORE THAN A YEAR WITHOUT HARD LABOR, OR BOTH, MIGHT BE PROSECUTED BY INFORMATION

The two questions propounded by the court below are in substance the same and an answer to one of necessity will answer the other.

It is evident that the offense for which the appellant was prosecuted and of which he was convicted is a misdemeanor. Section 335 of the Criminal Code provides that "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors * * *." The maximum punishment which may be imposed under Section 137 of the Criminal Code, the statute under which the appellant was convicted, is a fine of $1,000 or imprisonment for not more than six months, or both.

Prior to the amendment of Section 335 by the addition thereto of the proviso (*infra,* p. 9), it was uniformly held that misdemeanors punishable by fine, or by imprisonment not exceeding one year,

without hard labor, or both, were not "infamous" crimes within the meaning of the Fifth Amendment (*supra;* p. 2) and therefore might be prosecuted by information. Thus, in *Falconi* v. *United States,* 280 Fed. 766 (C. C. A 6th), where the authorities are collated, it was said (p. 767):

> It is now thoroughly well settled that all felonies as defined by section 335 of the Criminal Code (Comp. St. § 10509) are infamous crimes, for which no person shall be held to answer unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. *Ex parte Wilson,* 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Mackin et al.* v. *U. S.,* 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson* v. *U. S.,* 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; *U. S* v. *De Walt,* 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; *In re Mills,* 135 U. S. 263, 267, 10 Sup. Ct. 762, 34 L. Ed. 107; *In re Claasen,* 140 U. S. 200, 204, 11 Sup. Ct. 735, 35 L. Ed. 409.
>
> It would seem to be equally well settled that misdemeanors punishable by fine, or by fine and imprisonment not exceeding one year, unless there should be coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous, are not infamous crimes, within the purview of the Fifth Amendment, and may be prosecuted by information. *In re Bonner, Petitioner,* 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. Ed. 149; 4 Blackstone,

Com. 310; *Hunter* v. *U. S.* (C. C. A.) 272 Fed. 235; *Robertson* v. *U. S.* (C. C. A.) 262 Fed. 948, 950; *Brown* v. *U. S.*, 260 Fed. 752, 171 C. C. A. 490; *Blanc* v. *U. S.*, 258 Fed. 921, 923, 169 C. C. A. 641; *U. S.* v. *Wells Co.* (D. C.) 186 Fed. 248; *U. S.* v. *Camden Iron Works* (D. C.), 150 Fed. 214; *De Four* v. *U. S.*, 260 Fed. 596, 598, 171 C. C. A. 360; *Weeks* v. *U. S.*, 216 Fed. 292, 298, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

In the case of *Wong Wing* v. *U. S.*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, the Supreme Court held that a statute authorizing imprisonment at hard labor for a definite period inflicts an infamous punishment, and therefore the offense, though a misdemeanor, is an infamous crime, within the meaning of the Fifth Amendment. This holding in the Wong Wing Case has been considered, approved, and followed by the Supreme Court in the recent case of *United States* v. *Moreland* (decided April 17, 1922) 257 U. S. —[1], 42 Sup. Ct. 368, 66 L. Ed. —. If the decision in *Wong Wing* v. *U. S.* was at all doubtful, that doubt has been dispelled by the clear, positive, and definite declaration of the Supreme Court in *U. S.* v. *Moreland* that imprisonment at hard labor for any definite term, regardless of the length of the term or the place of imprisonment is infamous punishment, and that, where the accused is in danger of an infamous punishment, if convicted, he has a

[1] 258 U. S. 433.

> right to insist that he be not put upon trial, except on the presentment or indictment of a grand jury.

See also *Hunter* v. *United States*, 272 Fed. 235, 238 (C. C. A. 4th); *Christian* v. *United States*, 8 F. (2d) 732, 733 (C. C. A. 5th).

As the statute under which the appellant was convicted does not provide for imprisonment at hard labor and the certificate recognizes that no infamous punishment is involved, it is apparent that it is not open to question that prior to the amendment of 1930 to Section 335 the appellant could have been prosecuted by information.

On December 16, 1930, Congress amended Section 335 of the Criminal Code by adding to its original provisions the proviso "That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

It is the position of the appellant, in effect, that this amendment constitutes a limitation upon the power to prosecute for misdemeanors by information which had been theretofore uniformly recognized and that thereafter the only class of misdemeanors in which prosecution may be by information are those wherein the punishment may not be more than six months' confinement in a common

jail without hard labor or a fine not in excess of $500, or both.

This precise contention was made before the Circuit Court of Appeals for the Third Circuit in the case of *Thorm* v. *United States*, 59 F. (2d) 419. That court held the contention was without merit, saying (pp. 419–420):

> It is the position of the defendants that this act of Congress changes all that has gone before, and definitely determines just what cases may be prosecuted on informations. Such cases, they say, are all those wherein the punishment could be no more than six months' confinement in a common jail, without hard labor, and a fine not in excess of $500; and that all other cases must be prosecuted by indictment. I think this position to be wholly untenable. Congress was simply attempting to divide misdemeanors into two classes, one class of which it designated as petty offenses, with lower penalties. There are no words in the act, either expressly or by any reasonable implication, by which the remaining class of misdemeanors should be made subject to indictment.

This Court denied a petition for writ of certiorari, 287 U. S. 624.

The correctness of this decision is made apparent by a statement of the genesis of the amendment, which was not discussed in the court's opinion in the *Thorm* case.

During the Prohibition era while the court had uniformly applied the general rule that misdemeanors punishable only by a fine or imprisonment for not more than one year, or both, might be prosecuted by information (Cf. *Brede* v. *Powers,* 263 U. S. 4; *Remus* v. *United States,* 291 Fed. 513 (C. C. A. 6th), certiorari denied, 263 U. S. 717; *Rossini* v. *United States,* 6 F. (2d) 350 (C. C. A. 8th)), there were many offenses arising under the National Prohibition Act and amendatory and supplemental legislation which as to first offenders were misdemeanors but became felonies where the offender was a habitual violator or guilty of second or subsequent offenses (National Prohibition Act, Sec. 29, p. 22, c. 85, 41 Stat. 316; *United States* v. *Kelly,* 51 F. (2d) 263, 267–268 D. C. S. D. N. Y.). In view of this situation prosecutors considered it safer to resort generally to indictments for all offenses under the National Prohibition Act, however minor, rather than to use information.

On January 13, 1930, the President sent to Congress a message, to which he appended a report of the Commission on Law Observance and Enforcement, in which he called attention particularly to the recommended plan of the Commission for reducing congestion in the Federal courts by giving United States Commissioners enlarged powers in criminal cases. This report was entitled "Preliminary Report on Observance and Enforcement of Prohibition", and in so far as it relates to relief of congestion in the Federal courts it is copied in

the Appendix hereto (*infra*, p. 15). In this report the Commission recommended to Congress that congestion in the Federal courts, particularly in cases to which the Jones Law applied, might be relieved by the creation of a class of offenses to be designated "petty offenses", which could be tried before United States Commissoiners upon information or complaint. The chief purpose of the recommendation was a decrease, not an increase, in the number of crimes to be presented by indictment. That the Commission did not intend to recommend any enlargement of the category of cases in which indictments were required is apparent from its statement that "as things are, however, the congestion of prosecutions in the Federal courts for minor infractions caused by the necessity of proceeding by indictment in all cases, *except for the maintenance of a nuisance or for unlawful possession,* is a serious handicap to dealing vigorously with major infractions and makes handling of minor infractions perfunctory." (Italics ours.)

Pursuant to the Commission's recommendations, three bills were introduced in Congress—one amending the Jones Law by defining "casual or slight violations," one defining "petty offenses" (the bill in question), and one giving United States Commissioners jurisdiction to try such offenses. (House Report No. 1699, 71st Cong., 2d Sess., Cong. Doc. 9193; Senate Report No. 1161, 71st Cong., 2d Sess., Cong. Doc. 9186.) The first two bills were

passed by Congress, but the Commissioners bill, so called, failed to become a law. Even so, the amendment of the Jones Law (Act of January 15, 1931, c. 29, 46 Stat. 1036, amending the Jones Law) created four classes of petty offenses. Thus the statute here involved, Section 335 of the Criminal Code as amended, in conjunction with the 1931 Amendment of the Jones Law clarified the situation confronting prosecutors with respect to petty liquor violations. Those offenses classified in both Acts as "petty offenses" might be prosecuted by information or complaint.

Thus, though the bill for the simplification of procedure in the trial and disposition of petty offenses failed of enactment, the amendment of Section 335 of the Criminal Code became law. This amendment was doubtless introduced in order to give statutory sanction to the treatment of all crimes the penalty for which does not exceed imprisonment for six months or a fine of not more than $500 or both, as "petty offenses" triable before a magistrate. See *Callan* v. *Wilson*, 127 U. S. 540, and *Schick* v. *United States*, 195 U. S. 65. When the Commissioners Bill failed, this purpose no longer existed, but Congress having nevertheless enacted the amendment to Section 335, legal effect must be given to its plain language without extending this language by implication to accomplish results which were plainly contrary to the legislative intent. The amendment deals only with misdemeanors punishable by imprisonment for not

more than six months and authorizes the prosecution of these to be instituted either by complaint or by information. It does not in terms apply to other misdemeanors which had always been prosecuted upon information with leave of court. *Albrecht* v. *United States*, 273 U. S. 1. The legal effect of the amendment, therefore, is to define petty offenses and to permit such offenses to be prosecuted not only upon information but also upon complaint without leave of court. This seems to us the obvious effect of the statute, and there is no necessity for the extension of its terms by implication in order to give it legal effect. To indulge such implications would defeat the obvious purpose of the law by requiring prosecution by indictment of all misdemeanors punishable by imprisonment for more than six months—a result directly opposed to the purpose sought to be accomplished.

It was in the light of this legislative history of the amendment to Section 335 of the Criminal Code that the *Thorm* case was decided. That decision is in conformity with the evident purpose of the amendment, which was obviously not intended to increase the classes of offenses which must be prosecuted by indictment.

## CONCLUSION

For the reasons heretofore stated, we respectfully submit that the questions certified by the court below should be answered in the affirmative.

STANLEY REED,
*Solicitor General.*

BRIEN MCMAHON,
*Assistant Attorney General.*

WILLIAM W. BARRON,
*Attorney.*

J. T. M. REDDAN,
*Special Attorney.*

MAY 1937.

# APPENDIX

## Extract From Preliminary Report of Commission on Law Observance and Enforcement With Reference to Observance and Enforcement of Prohibition

### (D) PROVISIONS FOR RELIEVING CONGESTION IN THE FEDERAL COURTS

From various parts of the country come complaints of congestion of the Federal courts due to the large volumes of petty prosecutions under the national prohibition act. Obviously, these prosecutions must go on. It would not do to create an impression that minor infractions are to be ignored. As things are, however, the congestion of prosecutions in the Federal courts for minor infractions caused by the necessity of proceeding by indictment in all cases, except for maintenance of a nuisance or for unlawful possession, is a serious handicap to dealing vigorously with major infractions and makes handling of the minor infractions perfunctory. It has done much to create a feeling in some localities that the law can not be enforced. In our opinion the delays and opportunities for escape from punishment thus occasioned may be and should be obviated.

Three methods to this end have been suggested: First, to increase the number of Federal judges; second, to create inferior Federal courts, or, as it has been put, Federal police courts, for such cases;

and, third, to utilize the present machinery of the courts, meeting the causes of delay and congestion by a simpler procedure for petty cases.

There are constitutional questions to be considered in connection with both the second and the third of these proposals. The first does not involve any constitutional difficulties. But it leaves the cumbersome procedure by indictment, wholly inappropriate to minor infractions, in full force and multiplies the apparatus designed for great cases in order to deal with small ones. The objections to this method are palpable, and it should not be adopted if the situation may be met in some other way. So with the second. It involves some of the constitutional questions which must give us pause in connection with the third. But, what is more to be thought of, there are serious objections to multiplying courts. If it is possible to deal with this matter adequately with the existing machinery of the Federal system, it should be done. We think such a solution entirely possible, and in the right line of progress, not merely in the enforcement of the national prohibition act but of all Federal legislation.

Under the fifth amendment no one shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury. As construed by the Supreme Court, "infamous crime" means one punishable by imprisonment in a penitentiary, or for more than one year, or for any period if at hard labor. Hence, where imprisonment is to be in jail, is not to exceed six months, and is not to be at hard labor, the crime is not infamous. It is only where there is a possibility of imprisonment in the penitentiary, or for more than

a year, or at hard labor, that an indictment is required. The Jones Law has expressly recognized a class of "casual or slight violations." A statute providing that in prosecutions under Title II of the national prohibition law the district attorney may, in case of "casual or slight violations", prosecute by complaint or information, and in such cases, when so prosecuted, the penalty for each offense should be a fine not to exceed $500, or imprisonment in jail without hard labor, not to exceed six months, or both, would obviate the long delay, unnecessary expense, and needless keeping in session of grand juries which are demanded by the present state of the law.

We think also that it would be expedient for Congress to define the term "casual or slight violations." Speedy convictions and certain imposition of penalties are important considerations, and are more likely to be efficacious than threats of severe punishment rendered nugatory by congested dockets overpassing any possibilities of trial in the manner constitutionally appointed for crimes of such magnitude. But this suggestion, made on general considerations applicable to all criminal laws, and out of abundant caution, may not be a vital part of the plan.

Next, to simplify the mode of prosecution of petty cases, we must consider the matter of pleas of guilty and of trials. As the law is, every offender must be indicted, must await indictment before he can plead guilty, even if ready to do so at once, and his case must, if he pleads not guilty, await its turn on the calendar, obstructing, if it is a petty case, the disposition of important cases. The mere accumulated number of these petty pros-

ecutions awaiting trial has become a source of embarrassment in many Federal courts.

Section 3 of Article III of the Constitution requires trial of all "crimes" to be by jury. The sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." It has been held that "crimes" in this connection does not refer to petty offenses. In view of the general holding of State courts on analogous provisions and of the concessions and distinctions made by the Supreme Court of the United States in the leading case of *Callen* v. *Wilson* (127 U. S. 540, 555, 557), we think it is possible to provide for a hearing in the United States district court before a magistrate, provided trial by jury in that court is preserved to the accused. But we see no need of setting up special Federal magistrates. It would seem entirely feasible to make use of the existing system of United States commissioners.

It could be provided that in case the accused, prosecuted by complaint or information, pleads guilty, such plea may be reported by the commissioner to the court and judgment of conviction rendered and sentence imposed by the court. Then it could be provided that in case the accused so prosecuted pleads not guilty, there shall be a hearing before the commissioner, who shall report to the court, and the court on examination of his findings render judgment of acquittal or conviction as the case may be, and in case of conviction impose sentence. It could be provided further that if conviction is recommended by the commissioner, the

accused may within three days after filing of the commissioner's report except in writing to the report and demand trial by jury. Finally, it could be provided that in such case the district attorney may elect whether to go to trial on the complaint or information or to submit the case to the grand jury and that, in case the grand jury indicts, the case shall then proceed upon the indictment.

The Jones law was enacted to make enforcement more efficacious in two ways: (a) By providing for more severe penalties in the discretion of the court; (b) by making available the collateral consequences of a felony, such, for example, as the rules of law applicable to prevention of a felony and the capture of felons. This was done by making every violation of the national prohibition act a potential felony.

The foregoing suggestions aim at preserving this feature of the existing law. Up to the time when the district attorney elects how to prosecute there is a potential felony. In other words, all the possibilities in the way of arrest and prevention which obtain under the existing law are conserved. But the intention is to make it possible in case of "casual or slight violations" (language of the Jones law) to prosecute as a petty offense, thus relieving congestion in the Federal courts, maintaining the dignity of those tribunals, and making possible speedy disposition. As things are now, the cumbersome process of indictment must be resorted to even in the most petty case. The result is that large numbers of these cases pile up and have to be disposed of offhand by "bargain day," and similar unseemly processes. In any case which the district attorney elects to prosecute by indictment the

judge will still have the discretion provided for in the existing law. If it is objected that a wide discretion is put in the district attorney by the proposed legislation, the answer is that he has that discretion already in effect, simply exercising it, not in the beginning by the mode in which he prosecutes but later by including any particular prosecution in the wholesale disposition on some bargain day.

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